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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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INTEREST OF THE AMICUS.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an un-

*Consents of all parties to the Chamber's filing of the instant brief previously have been filed with the Court. All parties have been re-contacted and none oppose the Chamber's filing of its brief at this time, subject to the Respondent Union's sole condition that the filing will not result in postponement of oral argument or delay the Court's subsequent consideration of this case.

derlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views in areas which significantly affect their rights and interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases raising significant Title VII** and related questions. *E.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Geduldig* v. *Aiello*, 417 U. S. 484 (1974); *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974); *Emporium Capwell Co.* v. *Western Addition Community Organization*, ... U. S. ....., 43 USLW 4214 (1975); *Albemarle Paper Co.* v. *Moody*, ... U. S. ....., 43 USLW 4880 (1975); *Liberty Mutual Insurance Company* v. *Wetzel*, No. 74-1245, *petition for writ of certiorari granted.*

The issue presented by this case—whether Title VII prohibits granting a class of minority job applicants, initially denied employment because of their race, artificial seniority rights over those seniority rights of incumbent white employees—is a matter of significant concern for the Chamber and its members.

In reliance on § 703(h) of the Act, the Fifth Circuit below held that Title VII does not permit the extension of artificial, retroactive seniority rights as a remedy for an employer's past failure to hire a class of persons because of their race. The primary burden of such an award falls not upon the employer but upon incumbent, innocent employees, destroying their legitimate rights and expectations secured through collective bargaining. Where, as here, with respect to the over-the-road truck driver positions at issue, a seniority system is company-wide, "bumping down" experienced incumbent white employees in favor of minority applicants would be inequitable and contrary to the Con-

** Title VII of the Civil Rights Act of 1964, as amended, 42 USC [Supp. II, 1972] § 2000e, *et seq.*; hereinafter referred to as "Title VII" or the "Act".

gressional intent to preserve seniority rights from erosion under Title VII. While the Chamber recognizes the need to establish remedies which serve the dual objectives of preventing and remedying employment discrimination, it is particularly concerned with the propriety of a remedy which redresses past discrimination against minorities by imposing equivalent or even greater burdens on other employees.

Since many members of the Chamber are parties to collective bargaining agreements containing seniority provisions, those members are vitally concerned with the effect of any decision herein on the stability of their collective bargaining relationships. The Chamber thus desires to submit its views to aid this Court in reaching a resolution of the important issue presented in this case.

SUMMARY OF ARGUMENT.

In Title VII Congress established a national priority to open the doors of equal employment opportunity and put an end to discriminatory hiring and employment practices in the future. However, the legislative history underlying § 703(h) of Title VII establishes that Congress did not intend that discrimination be remedied by destroying the earned seniority rights of incumbent employees. Thus, one of the reasons opponents of the Act sought to prevent its passage was their expressed fears that Title VII would destroy seniority rights. To alleviate this fear, the proponents made it clear that the Act would in no way—either in substance or by way of remedy—have such an effect. The artificial retroactive seniority sought by Petitioners for a class of job applicants, previously rejected because of their race, contravenes this Congressional desire.

Further, an award of artificial retroactive seniority imposes retribution for past discrimination, not primarily on the wrongdoer, but upon innocent employees, depriving them of their earned rights and expectations. Such retribution is inequitable and will not further the societal need to eradicate discrimination. While persons denied an opportunity to compete for employment in the past should be accorded the opportunity denied them, the effect of the Act would be unjust if it were held to permit them to take away what others, innocent of wrongdoing, have earned.

Finally, in enacting Title VII Congress was aware of the potential for conflict between the priorities granted thereunder and the rights granted under the National Labor Relations Act, 29 USC § 151, *et seq*. Accordingly, Congress expressed a clear desire that in weighing these competing interests under national policy, the rights accorded by the Labor Act should not be eroded by Title VII. Negotiated seniority rights are a product of collective bargaining fostered by the NLRA. The destruction of those rights as a means of remedying discriminatory hiring practices under Title VII is contrary to the balance struck by Congress.

ARGUMENT.

ARTIFICIAL SENIORITY IS ANTITHETICAL TO CONGRESSIONAL INTENT, EQUITY, AND THE PRIORITIES ESTABLISHED BY NATIONAL LABOR POLICY.

A. The Legislative History of Title VII, § 703(h), Establishes That Congress Intended to Preserve Seniority Rights From Erosion Under That Act.

The Fifth Circuit correctly determined that § 703(h) of Title VII bars the creation of artificial seniority rights. Throughout the Congressional debates opponents of Title VII criticized the Act because, they asserted, it would serve to destroy rights conferred on employees by virtue of collectively bargained seniority systems. In response to this criticism, proponents of the Act took great pains to insure that the purposes of Title VII were *not* as the opponents feared; that Title VII would *not* undermine seniority rights.

Thus, during the initial examination of H. R. 7152, the genesis of Title VII in the House, Chairman Cellar of the House Judiciary Committee, in response to criticism that the bill would destroy seniority rights, stated:

> "It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin." 110 Cong. Rec. 1518 (1964).

Such assurances did not effectively assuage the fears of House opponents that the bill would sweep away seniority rights.[1] Opposition continued in the Senate.[2]

1. See, H. R. 914, 88th Cong., 1st Sess., 71-72 (1963).
2. See, 110 Cong. Rec. 486-487 (1964) (remarks of Senator Hill).

Early in the Senate debates, Senator Humphrey attempted to quiet the criticism levied against the bill by declaring that "this bill is not an instrument to abolish seniority or unions themselves as some have charged." 110 Cong. Rec. 6549 (1964). Echoing Senator Humphrey's statement, Senator Kuchel explained that under Title VII a court:

> "cannot order preferential hiring or promotional consideration for any particular race, religion or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring. *Neither would seniority rights be affected by this Act.*" 110 Cong. Rec. 6563-64 (1964). (emphasis added).

In order to quell the continued opposition from opponents who challenged that Title VII would undermine seniority rights, Senator Clark along with Senator Case, his co-manager of the bill in the Senate, prepared a memorandum which explained that:

> "Title VII would have *no effect on established seniority rights. Its effect is prospective and not retrospective.* Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, *or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" 110 Cong. Rec. 7217 (1964). (emphasis added).

Further, the Clark-Case memorandum responded to several questions raised by Senator Dirksen, one of the co-sponsors of the substitute amendments which were finally enacted into law. One of the questions and the response thereto was:

> Question: If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?
>
> Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists." 110 Cong. Rec. 7216-17 (1964).

This question and answer particularly addresses the issue before the Court and resolves it. Thus, Senator Dirksen's question clearly asks whether seniority may be affected in order *to remedy* an employer's discriminatory hiring practice; that is, what happens to seniority in consequence of an employer's discrimination? Senator Clark's response to this pointed inquiry is equally unclouded: Insofar as seniority is concerned, the remedies under the bill are not retroactive; an employer found guilty of discrimination will not have to change existing seniority lists.[3]

Moreover, in direct rebuttal to Senator Hill's contention that Title VII would erase collectively bargained seniority rights, Senator Clark introduced a memorandum prepared by the Justice Department. That memorandum states in relevant part:

> "First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true *even in the case* where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a

3. In general, the desire of the bill's proponents to persuade its critics that the bill would in no respect disturb existing seniority rights is also revealed in one of the preceding questions and answers:

> "Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer: Seniority rights are in no way affected by this bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be the 'first fired' as long as it is done because of his status as 'last hired' and not because of his race."

chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7207 (1964). (emphasis added).

After placing the Justice Department memorandum in the Record, Senator Clark concluded:

> "Mr. President, it is clear that the bill would not affect seniority *at all.*" 110 Cong. Rec. 7207 (1964). (emphasis added).

Finally, despite these efforts on the part of Title VII proponents to allay criticism regarding the effect of the Act on seniority rights and to end the filibuster which threatened passage of the bill, § 703(h) was expressly added as part of the Mansfield-Dirksen substitute.[4] Senator Humphrey explained the addition of § 703(h) "does not narrow the application of the Title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964).

4. § 703(h) provides in relevant part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin."

It is clear that Congress intended that Title VII would not serve to undermine collectively bargained seniority rights of incumbent employees so long as the seniority system is itself nondiscriminatory.[5]

The Petitioners raise three challenges to this legislative history, none of which withstand scrutiny. First, Petitioners assert that because the foregoing statements concerning seniority rights occurred several weeks before insertion of Dirksen-Mansfield substitute containing § 703(h), those statements are not indicative of a Congressional intent to preserve those rights. This argument is contrary to this Court's view of the legislative history regarding Title VII. Thus, in *Griggs* v. *Duke Power Co., supra,* this Court, in construing the meaning and intent of § 703(h), considered "the sum of legislative history" including the Clark-Case memorandum, which Petitioners here claim to have no weight.[6]

5. Petitioners do not attack the "last hired, first fired" or employment date seniority system here at issue as containing discriminatory features which render it unlawful. Insofar as job applicants—as opposed to transfers—for the over-the-road driver jobs herein are concerned, the instant case does not involve departmental seniority, which locks black employees into lines of progression separate from their white counterparts and which has been condemned as not *bona fide*. Cf. *Griggs* v. *Duke Power Co., supra; Local 189, Papermakers* v. *United States,* 416 F. 2d 980 (5th Cir. 1969), *cert. denied,* 347 U. S. 919 (1970).

6. To the same effect, see *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36 (1974) and *Phillips* v. *Martin-Marietta Corp.,* 400 U. S. 542 (1971).

In evaluating the weight and significance to be given to the Senate commentaries on Title VII, particularly in the absence of the customary Senate committee reports usually indicative of Congressional intent, at least one legal scholar has observed: "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history', or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Vaas, *Title VII: Legislative History,* 7 B. C. Ind. & Com. L. Rev. 431, 444 (1964). Accordingly, the views on seniority of Senate proponents of Title VII, such as Senators Humphrey, Kuchel, Clark and Case, should be given greater than normal weight in determining Congressional intent here.

Second, Petitioners contend that even if this legislative history indicates a clear intent on the part of Congress to preserve seniority rights, it expresses a desire to protect only those seniority rights which accrued prior to the effective date of the Act but not afterward. This contention is without merit. The Clark-Case memorandum expressly deals with the prospective effect of Title VII and states with respect to the future, that Title VII does not permit an employer ". . . once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 7217 (1964), *supra*. The Justice Department memorandum, in stating that Title VII would have no effect on seniority rights accruing prior to the effective date of the Act cannot be taken as expressing limitation. The pure logic of language compels rejection of Petitioner's argument. Thus, according to that memorandum, since the bill was intended to prohibit disruption of existing seniority rights "*even* in the case" where those rights were built up as a result of *pre*-Act discrimination, it follows that neither did the bill sanction such disruption *after* it became effective. The use of the word "even" cannot otherwise be understood. The clear thrust of the legislative history is directed to the *prospective* effect of the Act. The proponents of Title VII who authored and directed the preparation of these memoranda did so to assure opponents of the bill that it would not operate to destroy seniority rights. If Congress had intended to place a protective "freeze" on only those seniority rights which had accumulated prior to the Act and permit nullification of accumulated, vested seniority rights thereafter, it surely would have said so in no uncertain terms. Since there was such considerable effort on the part of Senate proponents to allay the fears of the critics that seniority rights would be destroyed by the Act, it is illogical to suppose that a limitation such as that suggested by Petitioners would have been thought by the proponents to be sufficient for that purpose nor that the critics would so readily have accepted it.

Certainly, Congress, familiar with collectively bargained seniority systems employed in industry, must be taken to have known

that the accumulation of seniority is a continuous, on-going process. It is this process and the rights accruing thereunder which Congress did not want to disturb. The impact of depriving individual employees of their accumulated seniority rights is the same whether those rights accrued prior to the Act or after its effective date. Further, it is the same whether an employer discriminatorily refused to hire minority persons before the Act or, as in the instant case, afterward. Moreover, the impact is the same whether the victims of the discrimination are unknown or identified.[7] It is this impact which is contrary to Congressional intent.[8]

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7. See, *Watkins* v. *United Steelworkers*, ... F. 2d ....., No. 74-2604 (5th Cir., July 16, 1975), where the Fifth Circuit held that despite a history of pre-Act discrimination, a "last hired, first fired" seniority system did not discriminate against recently hired blacks who had not been the subject of the pre-Act hiring practices; and *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *pet. for writ. of cert. pending*, where the Seventh Circuit held that while a *post-Act* amendment to the seniority provisions favoring the recall of white employees over a black employee discriminated against the black *employee*, Waters, that practice did not discriminate against a black, Samuels, who was a mere *applicant* at the time of the amendment. The difference in granting seniority relief to Waters and not to Samuels lies in the fact that Waters, an employee, like his white counterparts, had vested seniority whereas Samuels, a mere applicant, had none. Relying on the legislative history set forth hereinabove, the Seventh Circuit in *Waters* reasoned that "a policy favoring recall of a former employee with experience even though white, before considering a new black applicant without experience comports with the requirements of Title VII and § 1981. *Id.* at 1320.

In deciding whether the seniority systems at issue in both *Watkins* and *Waters* were unlawful, the courts were of the view that nullification of these systems and accrued rights thereunder would be contrary to the policy expressed in § 703(h): "To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such discriminatory preferences." *Waters, supra*, at 1320 citing *Griggs* v. *Duke Power Co., supra*, at 430-431; *Watkins, supra*, slip opinion at 6500. In the instant case, the impact of the preferential seniority, albeit as a remedy for past discriminatory refusals to hire, shackles white incumbent employees to the same degree.

8. The Respondent Union, after reviewing the legislative history of § 703(h) as well as § 703(j), 42 USC § 2000e-2(j), concludes that by that legislative history, Congress drew a distinction between

Finally, the Petitioners' contention that the policies which prohibit artificial seniority under the substantive provisions of the Act do not limit the authority of the courts to order such relief under the remedial section is unsound and has been rejected by this Court. In *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970), this Court held that the Labor Board could not order an employer to agree to a union's proposal for a dues checkoff deduction as a remedy for its refusal to bargain over such a proposal since § 8(d) of the Labor Act[9] provides that the obligation to bargain does not require a party to agree to any proposal made by the other. The Court rejected the lower court's view that since § 8(d) deals only with substantive violations of the Labor Act, it does not limit the Board's remedial authority under § 10(c) of that Act:[10] "We do not

making discriminatees whole as a remedy for proven discrimination, as opposed to granting preferential treatment where there has been no violation of the Act. This conclusion is not supported by the legislative history of those sections. Nowhere in the legislative debates is the distinction drawn which the Union claims was intended. Indeed, the distinction is not expressed because the debates reveal it would have been inconsistent with the objections raised to the bill's impact on existing seniority rights and the assurances given in response. Rather, those debates establish that the prospective effect of the Act—both as regards violations and remedies—would not destroy seniority rights or countenance the establishment of preferential quotas. Indeed, contrary to the Union's erroneous conclusion, the "make whole" remedy of artificial retroactive seniority conflicts with Congress' desire to insure that seniority rights would in no way be affected by the operation of Title VII.

9. National Labor Relations Act, as amended, 29 USC § 158(d).

10. 29 USC § 160(c) provides in pertinent part:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.*" (Emphasis added.)

Compare the similarity between this language of the NLRA and that of § 706(g) of Title VII, which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*" (emphasis added).

agree . . . that the remedial powers of the Board are not also limited by the same considerations which lead Congress to enact § 8(d)." *Id.* at 107-108. Here, the Petitioners urge that since § 703(h), by its terms, deals only with the substantive provisions of the Act, it does not limit the remedial authority contained in § 706(g). This contention is exactly like the one rejected in *Porter*. There, the NLRB urged that since § 8(d) of the NLRA deals only with substantive violations, it has no impact on the remedial policy expressed in § 10(c). Here, as in *Porter*, this contention is anomalous and would render the policy reflected in § 703(h) nugatory. Petitioners urge further that since a result here such as that reached in *Porter* would preclude them from obtaining artificial retroactive seniority for the applicants they represent, such an interpretation should be rejected because of some overriding "public policy" consideration in raising the expectations of minorities. The Chamber submits that the remedial power of the Act, as limited by the policies which underlie § 703(h), does not grant job applicants the artificial seniority they desire; that policy determination was within the province of Congress and it is not, as the Fifth Circuit below held, for the courts to substitute their determination of policy for that of Congress. This is precisely the thrust of *Porter, supra.*[11]

11. The Petitioners' contention that the remedial policy of the Labor Act supports the creation of artificial seniority under Title VII is without foundation. Unlike the statutory similarity between the NLRA and Title VII regarding back pay, § 703(h) of Title VII prohibits interference with contractual seniority rights, whereas no such provision, express or otherwise, is contained in the Labor Act. Moreover, there is no legislative history on the NLRA comparable to that underlying § 703(h) of Title VII. The Chamber submits

B. The Remedy of Artificial Retroactive Seniority Inequitably Places A Burden of Retribution on Innocent Employees.

This Court has observed that in "any equity case, the nature of the violation determines the scope of the remedy."[12] Here, Respondent Bowman's violation of Title VII was to deny employment opportunity to a class of persons because of their race. The Fifth Circuit ordered Bowman to remedy this unlawful conduct by ordering it to give priority, nondiscriminatory consideration to previous black applicants who still desire to work for it and to pay them back wages lost as a result of the Employer's refusal to hire them. The burden of this remedy falls upon Bowman, the wrongdoer. However, since "seniority is a system of job security calling for reduction of work forces in periods of low production by layoff, first, of those employees with the most recent dates of hire", the primary burden of artificial retroactive seniority falls directly upon incumbent employees who had "no hand in the wrongdoing".[13]

Thus, while an award of artificial seniority to a class of applicants may well accord them the seniority benefits they would have enjoyed had they been hired when they first applied, those benefits can never be granted without concommitantly reducing the earned seniority rights of incumbent employees.[14] It is an

because of the absence of a provision similar to § 703(h) and the legislative history underlying it in the Labor Act, that Act is no measure of whether retroactive seniority can be granted to applicants under Title VII.

Petitioners' further contention that even if preferential seniority may not be ordered as a remedy under Title VII, it nonetheless may be ordered under 42 USC § 1981 was not raised before nor considered by the Court of Appeals and, therefore, is not properly before the Court. *Adickes* v. *S. H. Kress and Co.*, 398 U. S. 144, 147 n. 2 (1970) and cases cited therein.

12. *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U. S. 1, 16 (1971).

13. *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939, 949 (6th Cir. 1975).

14. It is because artificial seniority benefits can never be awarded without affecting a relative reduction of earned seniority rights of

insufficient answer to this most difficult problem to assert, as do Petitioners, that incumbent employees may be deprived of the seniority rights which they earned because minority applicants were excluded from an employer's labor force in the past. The Petitioners, in urging that the class members whom they represent be accorded artificial retroactive seniority to place them in their "rightful place" to remedy a past refusal to hire blacks, are untroubled by the fact that incumbent employees will be deprived of their right to remain in their earned, rightful place and realize their legitimate expectations. Thus, an employee who cast his lot to go and remain with a particular employer did so at the cost of foreclosing all other employment possibilities open to him at the time he made his choice and thereafter. That decision was made, and other options foregone, surely in large part as a consequence of the protections which accumulated seniority afforded him. By remaining with his employer, he has worked to obtain increased job security and upon that has based certain expectations. Indeed, these expectations have frequently been earned at the cost of enduring the hardships of strikes and lockouts. Seniority benefits did not flow to him as a consequence of the employer's past discrimination against others; they were earned. In anticipation of the job security, promotions and increasing benefits he had earned, the employee is likely to have made financial and other commitments which he might be unable to honor if his seniority and its attendant economic benefits were taken from him.

If hardship may be measured by loss of expectation of earned and anticipated benefits and the degree of forced alteration in life-style, it is surely arguable that the effect of the remedy sought by Petitioners here will produce a greater hardship on the innocent incumbents than did the original failure to hire

incumbent employees in contravention of the Congressional intent resulting in § 703(h), that the test for awarding backpay established for *Albemarle Paper Co.* v. *Moody, supra,* is inapplicable to this case. In *Albemarle,* the question concerned the circumstances which require the courts to exercise their discretion to grant a remedy *permitted* by the Act. Here, the question is whether the Act *prohibits* the courts from awarding the remedy sought by Petitioners.

on the innocent discriminatees. Where other forms of relief are available to the discriminatees than the grant of artificial retroactive seniority, it appears reasonable to look to such other relief in order to achieve the maximum equity with the least injury.

Discrimination against blacks is an historical fact which involves a miasma of sociological, economic and educational factors as well as legal ones. For the past twenty years this Court has taught that discrimination is legally wrong, that minority preferences are wrong, that all, regardless of race, must be given an equal right *to compete* in our society.[15] Petitioners now ask the Court to solve the multi-faceted problem of curing past discrimination against blacks by depriving others of the fruits of their legitimate efforts. Moreover, those who would be disadvantaged by the preferential relief sought by "rightful place" advocates, are those least responsible for and least able to bear the burden of the past.[16] The Chamber respectfully submits the inequitable misplacement of such a burden will not cure the effects of nearly two hundred years of discrimination nor further

15. *E.g., Brown* v. *Board of Education,* 347 U. S. 483 (1954); *DeFunis* v. *Odegaard,* 416 U. S. 312, 320 (1974) (Justice Douglas dissenting).

16.

> "The history of the racial civil rights movements has been to change the law to prevent the dominant status of one race over another race and to establish an equality of legal status. This has ironically created a new intangible power still controlled by Whites in power, who are haunted by 'white guilt' and seek to atone with a self-imposed restitution of the group. Fortunately for those in charge of determining the terms of the restitution, payment is to be made by other Whites not in power, or unable to enter the power structure because they have been told to stand aside." Flaherty and Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas,* 12 Duq. L. Rev. 745 (1974).

The authors point out that it is not the white persons who have control of the power structure who are likely to be disadvantaged by preference for blacks, but other racial and ethnic minorities and poor whites who together comprise what sociologists have described as the "underclass". See also Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment,* 61 N. W. L. Rev. 363 (1966).

the purposes of Title VII. On the contrary, Title VII is successful because, as originally intended, it embodies the concept of meritocracy and reflects strong and just economic and social needs. The imposition of preferences, the burden of which must inequitably be borne by other employees, is as frustrating to these needs as is the original discrimination which it replaces.

C. Seniority Rights Are Established Under the National Labor Relations Act and May Not Be Eroded by Title VII.

The Justice Department memorandum inserted into the Senate debate by Senator Clark, in direct response to Senator Hill's objections to the Act, states that "[n]othing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA . . .";[17] and Senator Clark expressely stated, after placing the memorandum in the Record, that Title VII "would not affect the present operation of the National Labor Relations Act *or rights existing under the labor laws.*"[18]

An employee's seniority rights are rights which exist under the labor laws. That is, the express policy of the NLRA is to promote and encourage collective bargaining between employers and representatives of employees for the purpose of negotiating terms and conditions of employment.[19] An employee's seniority rights are the product of collective bargaining. Indeed, as Petitioners acknowledge,[20] seniority rights may well be one of the most important terms and conditions of employment resulting from the historic struggle between business and labor. The legislative history underlying § 703(h) expressly demonstrates that Congress intended to preserve these important rights from erosion by the effects of Title VII. Given Congress' awareness of the tension between the National Labor Relations Act and

17. National Labor Relations Act, as amended, 29 USC § 151. *et seq.*

18. 110 Cong. Rec. 7207 (1964). (emphasis added).

19. NLRA, *supra,* at § 151.

20. Petition for Writ of Certiorari at 15, n. 15.

Title VII, the evidence of the Justice Department Memorandum and the very passage and language of § 703(h) itself reveals a Congressional determination that on the subject of seniority, the tension has been resolved in favor of the rights guaranteed in the National Labor Relations Act.

Thus, while remedying discrimination is a matter of priority under our national labor policy, granting artificial retroactive seniority negates the priority which Congress chose to accord collectively bargained seniority rights established under that same policy. Just this term, this Court has had occasion to weigh competing priorities established under Title VII and the NLRA and, even in the absence of a strong statutory prohibition similar to that expressed in § 703(h), subordinated a Title VII priority to certain greater interests served by the policies of the NLRA. The *Emporium Capwell Co.* v. *Western Addition Community Organization, supra.*

In that case, arising under the NLRA, minority employees sought to circumvent the collectively bargained grievance procedure and bargain directly with their employer over practices which they felt discriminated against them. Though the Court noted that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority," it made that priority subservient to the policy favoring resolution of grievances through the collective bargaining machinery established under the NLRA.[21] In the instant case, as the legislative history underlying § 703(h) demonstrates, Congress chose to give priority to seniority rights established under the NLRA within the framework of Title VII. Thus, Congress has already weighed the competing interests here at issue and struck that balance in favor of preserving seniority rights. Accordingly, this Court should confirm the balance struck by Congress.

21. To the same effect see *Boys' Markets, Inc.* v. *Retail Clerks Local 770,* 398 U. S. 235 (1970), where this Court found that the policy of the Norris-LaGuardia Act prohibiting injunctions against strikes must give way to the national labor policy favoring peaceful resolution of labor disputes through arbitration procedures established through collective bargaining.

CONCLUSION.

For the foregoing reasons, the Chamber respectfully submits that the Court of Appeals' judgment denying an award of retroactive seniority should be affirmed.

Respectfully submitted,

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